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DEFENDANT'S BRIEF

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 207.

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THE IOWA RAILROAD LAND COMPANY, PLAINTIFF IN ERROR,

vs.

CLAUDE F. BLUMER, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA

HENRY C. GARDINER and CONSTANT R. MARKS,

Solicitors and of Counsel for Defendant.

In the Supreme Court of the United States.

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vs

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DEFENDANT'S BRIEF

The question presented to this Court is a simple one. It is whether adverse possession under color of title for the period prescribed by the statute of limitations of the state of Iowa before certification by the General Land Office and the issuance of a patent will prevail against the latter. The Supreme Court of Iowa has decided that the statute of limitations had run in favor of the defendant in error and that the period of the statute should be computed from the time his grantor entered into possession under his receiver's receipt, which constituted his color and claim of title. The only remaining question then is whether under the laws of the United States and the practice of the Federal courts, the statute of Iowa is applicable to the facts in this case.

Stress is laid in the opposing argument upon the claim that

when Carraher, the grantor of defendant in error, originally took possession he recognized the paramount title to be in the United States. That from that time until the entry was cancelled in 1891, his possession was subservient to the government when it suddenly changed to hostility to the defendant. It is further contended that during all this time the title was in fact in the government and it is strenuously argued that under such circumstances adverse possession can never be made the basis for title.

That such conclusions are wholly unwarranted we have only to refer to the repeated decisions of this Court. The statute of limitations begins to run from the date of the ouster, Robinson vs. Lake, 14 Iowa, 421, and would have begun in this case when the entry was made and possession taken in 1888, but for the pendency of the appeal in the Land Office, which suspended the running of the statute until June, 1891. It was the contention of Carraher that the ultimate title was in the government and the land subject to entry. When the land department decided that the title had previously passed to the railroad company under the grant he remained in possession as before and the statute began to run against the defendant.

If this were the first case of this character before this Court the plaintiff's claim might be received with indulgence.

This Court and the Supreme Court of Iowa have held over and over again that the grant under which the defendant claimed title in this case was a grant *in præsenti*, under which title passed from the government to the railroad company upon the filing of the map of definite location, as was done in this case on October 13, 1856. (See evidence of plaintiff in error, Transcript, 23, 24, 30.)

C. R. I. & P. Ry. Co. vs. Grinnell, 51 Iowa, 476.
Sioux City &c. Co. vs. Griffey, 72 Iowa, 505.
Do. vs. Do. 143 U. S., 32.
B. & M. R. R. Co. vs. Lawson, 58 Iowa, 145.

Iowa Falls & S. C. Ry. Co. vs. Beck, 6[illegible] Iowa, 421.
C. B. & Q. R. Co. vs. Lewis, 53 Iowa, 101.
Courtright vs. Ry. Co., 35 Iowa, 386.

To hold in subservience to the government, invoking the aid of its land department and then when the railroad company obtained title, to use that holding as an honest claim of right in sustaining adverse possession against the railroad company, was upheld in Cole vs. Railroad Co., 7[illegible] Iowa, 185.

To obtain color of title and enter into possession while the title was in the government, and when the title passed to the railroad company to hold adversely against the latter until the statute had run, under the same color of title and possession, is just what was upheld in Railroad Co. vs. Allfree, 64 Iowa, 500, and Sater vs. Meadows, 68 Iowa, 507. The Court said in the first of said cases: "When the certification of the land was made, the statute began to run. The fact that defendant's prior possession could not have aided him to plead the statute against the government is no reason why he cannot plead his possession held after plaintiff acquired title." In the last case the Court said, citing the above case: "Even if his possession originated while the title was in the government, its adverse character attached and became operative from the time the title passed to the railroad company."

The case at bar is all the stronger from the fact that the color of title was obtained and possession taken after the title had passed from the government, instead of before.

It was said in argument before the state courts that the burden is on the defendant in error to show a change in the character of his holdings after the cancellation of his timber culture entry, but the cases cited in support of the statement contain no such doctrine. On the contrary, as the Supreme Court of Iowa has said, "Like an army of occupation, his flag was constantly unfurled. Each day and each year as he entered upon the land to plow, sow, cultivate and reap, there was a *distinct assertion* of his

claim of right to the land. When the railroad company acquired the title, this open and actual possession was held by the plaintiff, and it continued for more than ten years after that and before the conveyance to the plaintiff. Nothing more than this was necessary, and under these circumstances we think *it was wholly immaterial whether the defendants claim of right or color of title originated before or after the railroad company acquired title.*"

Tremaine vs. Weatherby, 58 Iowa, 615, 621.

Not only is such the holding of the Supreme Court of Iowa, but it is the general rule of all courts of last resort that the statute of limitations will begin to run against one claiming title from the government from the date of his compliance with the requirements of the government in favor of one holding adverse possession of the real estate.

Dolen vs. Black, 67 N. W. R., 760. (Neb.)
Udell vs. Peak, 7 S. W. R., 786. (Tex.)
Patten vs. Scott, 12 A., 292. (Pa.)
Hayes vs. Martin, 45 Cal., 559.

The attitude of plaintiff in error toward the land in controversy, as shown by its acts, its arguments, its pleadings and the evidence in this case, is simply this: For the purpose of defeating the title of the defendant in error and escaping the burden of taxation, the title has at all times vested in the government of the United States. For every other purpose, and particularly for the ultimate purpose of acquiring and enjoying the land, the title and ownership has always been, and now is, in the plaintiff.

The plaintiff argues that, while no question as to the land being reserved from the grant now exists, or has been raised for more than ten years before the bringing of this suit, and the title sufficiently vests in the plaintiff in error, the statute ought not to be held to run against the plaintiff until after the certificate as to mining claims was made by the land office in January, 1903.

Paragraph 6 of defendant's answer is as follows: "That as

defendant is advised and states said Land Commissioner has at all times held said land to be rightfully subject to certification and conveyance to said Railroad Company under said grant, but has *neglected* and failed to make such certification and conveyance, etc." Transcript, 3

The witness Burdett testified for the defendant:

"Thereafter, effort was made to secure the due certification of the land under the grant, resulting in a promise from the proper officials of the General Land Office, given on or about October 1, 1891, that the tract would be included in a patent which was then about to be prepared. * * * The duty of certifying the tract rested with the proper officials of the office, *and was in fact a mere clerical duty*." Transcript, 19, 20.

Again, "Down to a very recent date the railroad division of the General Land Office has been overburdened with work. * * * For most of the time during that period the force of clerks in that division was insufficient to promptly perform the necessary labor attendant upon such adjustments and the conveyance of lands under the grants." Transcript, 21.

We thus see by defendant's own allegations and evidence that the land office has at all times since Carraher's appeal was disposed of in 1891, and in fact always prior thereto, held that the land passed to the railroad company under the grant, and that the duty of so certifying was a mere clerical one which was delayed because the clerks were overburdened with work. For the purpose of preventing the statute from running and defeating the title of the plaintiff, defendant now seeks to turn this clerical duty and delay into an exercise of "jurisdiction" by the land department.

The certificate as to mining claims was a mere matter of detail connected with the certification and tended in no way to show that the railroad company had not acquired ownership under the grant of thirty years before. As the Supreme Court of

Iowa said in its opinion: "On the contrary the investigation resulted in confirming such ownership during this long period. As observed in Barden vs. N. P. Ry. Co., 154 U. S., 288, the delay of the government in issuing a patent does not affect the power of the company to assert in the meantime, by possessory action, its rights to the land which are in fact non-mineral."

The cases cited by counsel do not support the contention made. None of them go farther than to hold that the time during which the question of title to the land was pending in the land department cannot be counted in determining whether the statute of limitations has run, that the operation of the statute is suspended during a contest in the land office. The act of March 3, 1887, can have no application, for it provides merely for the recovery of land erroneously conveyed or certified by the government, thus specifically recognizing that the title to such lands had previously passed to the railroad companies. It did not purport to disturb the ownership of lands already earned and no adjustment of this grant was attempted.

The case of Barden vs. Northern Pacific Railroad, 154, U. S., 288, was a direct action brought by the railroad company to recover lands under the grant, which especially excepted lands known to be mineral. The Court distinguished in principle the application of the rule to lands which passed under the grant, and those which were excepted, in the following language, page 315: "The cases cited in support of the claim of plaintiff only show that the identification of the sections granted and of the exceptions therefrom of parcels of land previously disposed of, leaves the title of the remaining sections or parts thereof, *to attach as of the date of the grant.*"

If this case has any application to the case at bar it is this: That the title to the land in controversy passed to the defendant's grantor as of the date of the grant, and the delay of the government in certifying the land did not affect the power of defendant

to assert its title, and that therefore the statute would run in favor of plaintiff claiming title by adverse possession.

The Minnesota case of Railroad Co. vs. Olson, 91 N. W., 294, merely decided that the statute of limitations was suspended during the contest initiated by the defendant in the land office. The argument of counsel that Carraher was holding in subservience to the government under an attempt to obtain the title, and his possession was not, therefore, adverse, the court disposes of in the following language: "The mere fact that the defendant took possession of the land believing that the title thereto was in the United States, and intended by his possession to secure it by virtue of a homestead entry, would not prevent his possession from being adverse as against the plaintiff within the legal meaning of the term. And we assume that the plaintiff, by virtue of the congressional land grant, the completion of its railway, and the filing of the certificate of that fact, acquired such title to the land in question that it could at all times thereafter have maintained an action to recover the possession thereof, unless the litigation and proceedings in the land department operated to suspend its right to maintain such an action."

To the same effect are the Iowa cases of Dickerson vs. Yetzer, 53 Iowa, 681, and Grant vs. Railroad Co., 54 Iowa, 673, the Court merely holding that the lands were not taxable while a contest was pending in the land department, and the latter case arose under the grant of October 28, 1874, which contained a different provision regarding the certification of the lands. The Court said: "But under this act (May 15, 1856,) no certificate by the land department of the government is required. Iowa Homestead Co. vs. Webster County, 21 Iowa, 221."

In the case of Churchill vs. Sowards, 78 Iowa, 473, the defendant claimed under a tax title, the plaintiff under a military land warrant. The patent had not issued for this land when the tax deed was obtained, and such lands were not taxable until

three years after the issue of the patent. Moreover, the plaintiff's grantor, through a mistake, entered and obtained a patent for the wrong tract of land, and the Court rightly held that until a patent correctly describing the land was issued, the title was in the government and the statute of limitations did not run.

In Durham vs. Hussman, 88 Iowa, 36, the Court held that an entry under a forged assignment of a bounty land warrant which was concelled, gave the assignee no such interest in the land after such cancellation as rendered it subject to taxation.

The case of U. S. vs. Montana Mfg. Co., 196 U. S., 577, was a suit brought by the government to recover certain timber growing upon granted land, the court holding that under the special act, until identification of the sections the government retains a special interest in the timber growing upon the lands, which can have no bearing upon the case before us.

The case of Gibson vs. Chouteau, 13 Wall., 92, contains language which may be construed to indicate that the legal title must have passed from the government. This was an action in ejectment, the plaintiff's title being founded upon a location and patent under an Act of Congress of 1815, the provisions of which are not given in the opinion. The case turned, however, upon the distinctions observed in the Federal courts and in the courts of Missouri between legal and equitable proceedings, the Court saying: "The action of ejectment can only be sustained upon the possession by plaintiff of the legal title. For the enforcement of equitable rights, however, distinct equitable proceedings must be instituted. * * * If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or canceling the patent." As this distinction does not prevail under the practice of the state of Iowa, and as this was originally a suit in equity for the enforcement of such

equities as the Court referred to, it is difficult to see the application of this case to the case now before this Court. The case of Litchfield vs. Register & Receiver, 9 Wall., 578, merely decides that the courts will not interfere to control the action of the land officers. To the same effect is Humbird vs. Avery, 195 U. S., 480, and in the latter case the land was without the place limits and within the indemnity limits of the grant. In such case a different rule obtains.

As we have said, the argument that the doctrine of adverse possession is not applicable to the land in controversy until certification by the Land Department and Secretary of the Interior, is not a new one. It was first made more than forty years ago and has been continuously urged whenever a similar case has arisen. Not only have the courts settled the same question when arising under similar grants, but have disposed of the same argument as applied to the same grant and the same railroad from which the plaintiff in error derived its title. Thus, in Iowa Homestead Co. vs. Webster Co., 21 Iowa, 235, the Court said: "The argument against it is, that not until the lists are finally certified by the commissioner, can it be definitely known to what precise lands, by sections or parts of sections, the company will be entitled. And yet it is undeniably true, that upon the completion of so much of the line (within the time and in the manner fixed by the Act, as to which there is no question) the company was legally and absolutely entitled to this quantity of land. * * * And this, too, though the certificate of the Governor, and the final certificate at the department at Washington should not be made for months afterwards. In other words these subsequent acts would be but the perfection of the *evidence* of title, while the *fact* of completion would form the true basis of the right, and at once vest the interest." See also

Dubuque & Pacific Ry. Co., vs. Webster Co., 21 Iowa, 235.
C. B. & Q. Ry. Co. vs. Lewis, 52 Iowa, 101, 115.

Whitehead vs. Plummer, 76 Iowa, 181.
Cole vs. Des Moines Valley Ry. Co., 76 Iowa, 185.

The claim of one entering land for the purpose of ultimately acquiring title from the government by compliance with its laws, is just as hostile to all others as though the patent had been issued, although it is subservient to the government. The great weight of authority is that the claim of one who thus enters land may be subservient to the government if hostile to everybody else.

Clemens vs. Runckle, 84 Am. D., 69. (Mo.)
Mather vs. Walsh, 17 S. W., 755. (Mo.)
Moore vs. Bronfield, 34 Pac., 199. (Wash.)
Lord vs. Sawyer, 57 Cal., 65.
Alabama State Land Co. vs. Kyle, 13 So. (Ala.) 43.
Francoeur vs. Newhouse, 43 Fed., 236.
Northern Pacific R. Co. vs. Kranrich, 52 Fed., 911.
Railway Co. vs. Townsend, 86 N. W., 1007. (Minn.)

The court said in the first of the above cases: "The defendant, and those under whom he claims, did not enter or hold under the plaintiff. They did not recognize his title. They had no privity with him. They do not appear even to have known of the existenc of his title. They recognized a title in another person' the United States', who was supposed to be the proprietor, and as to the United States their possession was not hostile; but they did expect to acquire the title of the United States, believing themselves to have right of pre-emption to the exclusion of all other persons, and a present right to the use and possession of the land. The defendant has the actual possession, within the meaning of the statute of limitations, with a claim not of absolute title, but of a right which was adverse to all other persons."

As between individuals the statute of limitations begins to run from the time the party entering the land did all required of him to perfect his purchase. The claim thus becomes one of ownership and lacks only the paper title to make the claim com-

plete. It then ceases to be subservient to and becomes adverse to the government. If the title is in fact earned, the government retains nothing but the naked legal title and the claimant is the real owner. The land becomes segregated from the public domain and is private property.

Carroll vs. Patrick, 37 N. W., 671. (Nebr.)
Nichols vs. Council, 14 Am. St., 20. (Ark.)
Cavender vs. Smith, 56 Am. D., 541. (Iowa.)
Cady vs. Eigmey, 7 N. W., 102. (Iowa.)
Steele vs. Boley, 22 P., (Utah) 311.
Wirth vs. Branson, 98 U. S., 118.
Stark vs. Starr, 6 Wall., 402.

This Court has frequently announced the same conclusions as applied to the grant in this case and similar grants.

Thus, in Desert Salt Co. vs. Tarpy, 142 U. S., 241, the Court held that the patents were issued, not for the purpose of transferring title, but as *evidence* that the grantee had complied with the conditions of the grant, and that the railroad company had such title as would sustain an action for the recovery of the land.

The case of Toltec Ranch Co. vs Cook, 191 U. S., 532, is on all fours with the case at bar and repays a careful examination, the opinion repeating the doctrine previously announced by this Court, that adverse possession under the statute of a state after the act granting the land and before a patent issued will prevail against the patent title. An examination of the argument for plaintiff in error shows that counsel in that case cited many of the same cases and used the same arguments as do counsel in this case, but the Court distinguished them as not applying to the facts or the principles of the case.

See also as sustaining the same conclusions,

Van Wyck vs. Knowles, 106 U. S., 360.
Kan. Pac. Ry. Co. vs. Dunmyer, 113 U. S., 629.
New Orleans Pac. Ry. Co. vs. Parker, 143 U. S., 42.
Railroad Co. vs. Griffey, *Supra*.
Wisconsin Cent. Ry. Co. vs. Price, 133 U. S., 496.
Sharon vs. Tucker, 144 U. S., 533.

Why the certificate from the mineral division of the land department should be more important than a similar certificate as to swamp lands made two days later, does not appear. But the testimony of the plaintiff in error shows that the officers of the land department had passed on both of these matters prior to the entry by Carraher in 1888.

The claim of the state under the swamp land selection was finally rejected February 26, 1878. Transcript, 18.

Attached to the selection of this land made by the railroad company under the grant, was the affidavit of N. D. Parkhurst, the land agent of the company, stating that this land is vacant, unappropriated, and not interdicted mineral or reserve lands, and is of the character contemplated by the grant. The certificate of the Register and of the Receiver of the Land Office at Des Moines is also attached to said list, dated May 13, 1885, showing that they have carefully and accurately examined said list, and certifying that the filing thereof is allowed and approved; that no part thereof is returned or denominated mineral lands, nor claimed as swamp land, nor is there any valid claim to any portion of said lands on file or recorded in their office. Transcript, 26.

It is a matter of common knowledge that, under the practice of the land office, the final certificate of the Commissioner and of the Secretary are based upon the certificate of the officers of the local land office. The clerks in the department examine these certificates, and if found correct and in proper form, they prepare certificates for execution by the Commissioner and Secretary, and, as stated for the defendant by the witness Burdett, who was himself formerly Commissioner of the Land Department, the duty of certifying the tract *was in fact a mere clerical duty.*

No claim has ever been made that the land in controversy did not pass under the grant by reason of its being mineral land. In Toltec Ranch Co. vs. Cook, the Court in distinguishing that

case from the Barden case, said of the latter case: "In other words, mineral lands were not conveyed, whether known or unknown to be such at the time of the grant. * * * But it was not intimated nor does it follow, that the conveyance of the title to the company was by the patent and not by the granting act. * * * The case decided only that lands did not pass by the grant which were reserved from it. An evident proposition, whatever might have been the difficulties in determining what lands were reserved."

The land in controversy was not reserved from the grant, as the evidence shows, and applying the reasoning of the above case, the conveyance of the title was by the grant and not by the certification or patent, whatever might have been the delays or difficulties in their issuance. As said by this Court, they are the perfection of evidence of title, not the conveyance of title.

We are firmly of the opinion that a careful consideration of this case and an examination of the authorities cited will convince the Court that these conclusions are right, that the judgment of the Supreme Court of Iowa was just and should be affirmed.

Respectfully submitted,

HENRY C. GARDINER,
CONSTANT R. MARKS,
Solicitors and of Counsel for Defendant.

We wish to call the Court's attention to the fact that no assignment of errors or prayer for reversal was annexed to or returned with the writ of error for the removal of this case to this Court, or appears in the transcript of record in this case, as required by section 997 of the Revised Statutes of the United States. There is, therefore, nothing before this Court for its consideration, and under section 4 of Rule 21 of the Rules of this

Court, the counsel for plaintiff will not be heard unless requested by the Court.

We, therefore pray this honorable Court to dismiss the writ of error issued in this case, and for such further judgment as will protect the rights and interests of the defendant.

HENRY C. GARDINER,
CONSTANT R. MARKS,
Attorneys for Defendant.